

DSI Enterprises, Inc. and James Lewis. Case 5-CA-22205

May 28, 1993

DECISION AND ORDERBY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On February 24, 1993, Administrative Law Judge David S. Davidson issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The judge, in par. 11 of sec. II,B, of his decision, inadvertently referred to the discharge of James Lewis, Jerry Wheeler, and Sampson Wheeler as occurring on September 8, 1991. The three were discharged on September 6, 1991.

Angela S. Anderson, Esq., for the General Counsel.
Joseph L. Gibson Jr., Esq., of Silver Spring, Maryland, for the Respondent.

DECISION**STATEMENT OF THE CASE**

DAVID S. DAVIDSON, Administrative Law Judge. The charge in this case was filed on September 6, 1991, and the complaint issued on October 21, 1991. The complaint alleges that Respondent terminated James Lewis, Jerry Wheeler, and Sampson Wheeler because they engaged in protected concerted activities, thereby violating Section 8(a)(1) of the National Labor Relations Act. Respondent denies the commission of any unfair labor practices.

The trial in this case was held in Baltimore, Maryland, on May 20, 1992. Briefs have been received from counsel for the General Counsel and the Respondent.

I. JURISDICTION

Respondent, a Maryland corporation with a place of business in Baltimore, Maryland, is engaged as a contractor in the construction of concrete walls, stairs, and sidewalks. It annually performs services valued in excess of \$50,000 with-

in Maryland for enterprises which are directly engaged in interstate commerce. I find that Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE ALLEGED UNFAIR LABOR PRACTICES**A. The Facts**

During the summer and fall of 1991, Respondent subcontracted with the George Hyman Company to perform site work at Camden Yard, the new baseball stadium being constructed in Baltimore to be the home of the Baltimore Orioles. Roosevelt Laboo is the president of Respondent. Victor Thomas was job superintendent, and Art Brookshire was a foreman on the job. Respondent admits that Laboo and Thomas were agents of Respondent and that they and Brookshire were supervisors within the meaning of the Act at times material to this case.

James Lewis, Jerry Wheeler, and Sampson Wheeler were hired on July 30, 1991, as carpenters to build forms for concrete under the supervision of Brookshire. The Wheelers, who are brothers, rode to and from the jobsite with Lewis, and the three of them worked in a crew with one additional carpenter and one or two laborers.

At the end of the first week of August they received their first paychecks. Lewis attempted to cash his paycheck at Respondent's bank which refused to cash it, telling him that there were insufficient funds in the account. Lewis told the Wheelers about it and suggested that they not go back on the job. The Wheelers took the position that they should give Respondent a chance to straighten out the problem and that they should not quit. The three of them continued to report to work.

Lewis cashed his paycheck at a pawn shop, and thereafter heard that the pawn shop was going to have him locked up because he had cashed a bad check. Lewis and Sampson Wheeler spoke to Brookshire who promised to speak to Laboo about it. Later Brookshire told Lewis that Laboo would take care of it. Some time later Lewis learned that Laboo had paid the pawn shop the amount of the paycheck but not the \$25 fee charged for the return of the check.

At the end of his second week on the job, Sampson Wheeler tried to cash his paycheck and was told at the bank that there were insufficient funds in Respondent's account.

On August 30, the Friday before Labor Day, Lewis went to the bank to cash his paycheck and was again told that it could not be cashed because of insufficient funds. He and Sampson Wheeler tried to get their paychecks cashed that afternoon at other places without success. Jerry Wheeler, who previously had no problem with his paychecks, usually deposited his paycheck in his savings account. When Lewis and his brother were unable to cash their checks, he decided not to deposit his paycheck that weekend.

On the following Tuesday Lewis took the day off. The Wheelers went to the jobsite and told Brookshire that they were not going to work until they got their paychecks cashed. At Thomas' suggestion, Brookshire let them go to cash the paychecks. They went to Respondent's bank where Sampson Wheeler was again told that he could not get his paycheck cashed. They went back to the jobsite and told Brookshire that they could not get their checks cashed.

Brookshire told them that since half the day was gone they should take the rest of the day off and come in the next day when Laboo would be there with money to cash their paychecks.

The next day Lewis and the Wheelers rode to work together. In the car they talked about the problem with their paychecks. Lewis said that he was going to go to the stadium authorities about it. At the jobsite Lewis again spoke to Brookshire about the checks. He told him that he couldn't keep working and getting bad checks, and that he was not going to go to jail because of Laboo's checks. That afternoon about an hour before his 3:30 quitting time Lewis walked over to the nearby stadium authority office and complained about the bad paychecks to someone he believed was named Tom Davis. Davis told him that Laboo was coming to the jobsite to straighten the paychecks up that afternoon, and that if he did not, Lewis should return to his office the next morning.

Laboo came to the jobsite at about 2:30. At one point before the end of the shift, he asked Sampson Wheeler who James Lewis was. According to Wheeler, he did not respond, and Laboo said, "Well, I will find out."¹

At the end of the shift, the men went to Respondent's trailer to change clothes. Laboo was in the trailer and started to cash paychecks. Laboo cashed Jerry Wheeler's paycheck and then asked, "Who is James Lewis?" Lewis identified himself, and then said, "Well, you didn't have to go to the man on me." Lewis just took his money and left.²

When Lewis and the Wheelers reported for work the next day, Brookshire and Thomas told them that there was no work for them that day but to come to work the next day. The next day, September 6, when they reported for work, Thomas told them that Respondent did not have any work for them and that they were fired. They asked whether they were fired because they complained about the bad paychecks. Thomas replied that it was because they complained about the paychecks too much and didn't give Laboo a chance.³

¹ I have credited Wheeler as to Laboo's statements to him. Laboo was not specifically asked about them but denied singling Lewis out at the jobsite. For reasons set forth below, I have not credited Laboo.

² Lewis and Jerry Wheeler testified to Laboo's statements. Laboo denied that he knew who Davis was, that he had any contact with the stadium authority, that he knew anything about Lewis' visit to the authority, or that he singled Lewis out while at the jobsite. Having observed the witnesses as they testified, I do not believe that Lewis and the Wheelers fabricated three separate statements by Laboo before and after their terminations showing that Laboo was looking for Lewis, that Laboo was aware of their dissatisfaction with Respondent, and that Respondent was dissatisfied with them. Even from Thomas' testimony, it is clear that when the three men were terminated, they immediately connected their terminations with their dissatisfaction over the bad checks, a connection more likely under their version of the facts than Laboo's. In addition, although Laboo testified that he did not know who was employed on the job and did not participate in decisions to hire and lay off employees, Thomas testified that he had weekly meetings with Laboo at which they discussed problems and projections at the jobsite. I have credited Lewis and the Wheelers as to Laboo's statements, and I have not credited Laboo's denials or his testimony that he played no role in the decisions to lay off the three employees.

³ After initially denying that he had any conversation with the three about their checks, Thomas ultimately agreed that the three men asked if they were fired because of their complaints about the checks. His own version of his response was not a denial but an am-

After the three men left the jobsite, Sampson Wheeler stopped at a telephone to call Laboo and asked him if he told his foreman to fire them because they asked about their paychecks. He testified that Laboo answered, "Well, you all was unsatisfied with us and we was unsatisfied with you all, and that is it."⁴

On the same day that they were laid off, Lewis and the Wheelers went to the Regional Office of the Board, and Lewis filed the charge in this case.

B. Concluding Findings

Counsel for the General Counsel contends that Lewis and the Wheelers engaged in protected concerted activity and that they were discharged because of it. Respondent contends that their activity relating to their paychecks was not concerted and that they were laid off for lack of work.

As the Board stated in *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992):

We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns expressed by the group. See *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Every Woman's Place*, 282 NLRB 413 (1986), enfd mem. 833 F.2d 1012 (6th Cir. 1987).

The first time Lewis discovered that he could not cash his check, the Wheelers were with him. They discussed it in the car riding to and from work, and although Lewis wanted to quit the job the first time he was unable to cash his check, the Wheelers talked him out of it. Lewis and Sampson Wheeler complained to Brookshire about the checks, and Brookshire said he would speak to Laboo. Lewis complained to Brookshire at least one additional time about Laboo's failure to pay the fee for the returned check to the pawn shop where Lewis had cashed his first check. On Labor Day weekend all three were together when the bank again refused to cash the paychecks. Although Jerry Wheeler did not try to cash his check, based on the experience of the others he decided not to deposit it. The day after Labor Day, Lewis did not come to work, and the two Wheelers refused to work until their checks were cashed. Brookshire and Thomas were aware of their concern over the checks.

Although Lewis testified that he did not go to the stadium authority on behalf of anyone else and that he acted only for himself, his visit to the stadium authority was a logical outgrowth of the continuing concern expressed by him and the Wheelers over the problem with their paychecks. Moreover, in the light of the earlier complaints and the Wheelers' refusal to work on Tuesday until their paychecks were cashed,

biguous disavowal of responsibility. Thomas also contradicted himself as to his awareness of the problems with the paychecks, initially denying any knowledge about it and ultimately testifying that he heard one of the Wheelers complain to Brookshire about his paycheck. I have not credited Thomas as to his response to the three at the time of their termination or Laboo's role in their termination.

⁴ According to Laboo, he had no such conversation with Wheeler, although he believed that some time after the layoff one of the three called his office and said that he would be sorry if they did not put the caller back to work. For reasons set forth above, I have credited Sampson Wheeler.

Respondent's treatment of the three as a group supports the inference that Respondent believed that the employees were engaged in concerted activity. See *Daniel Construction Co.*, 277 NLRB 795 fn. 4 (1985). I find that the three employees engaged in concerted activity in protesting the problem with their paychecks and that Respondent believed that their activity was concerted.

Laboo's statement to Lewis when he came to the trailer 2 days before the discharges supports the inference that between the time that Lewis went to the stadium authority and the time that Laboo cashed the paychecks at the end of the shift, Davis contacted Laboo at the trailer to follow up on Lewis' complaint. But even if Laboo's reference was to Lewis' complaint to Brookshire over Laboo's handling of the dishonored check he cashed at the pawn shop, Laboo's statement to Lewis in the trailer shows that Laboo sought to identify Lewis because of his protest over the check problem. That statement, Thomas' answer to the question asked by the three at the time of their termination, and Laboo's answer to Sampson Wheeler when he telephoned Laboo immediately after the terminations all support the inference that the terminations were caused by the protests over the dishonored checks.

Under the Board's decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), once the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to discharge the three employees, the burden shifts to Respondent to demonstrate that the discharges would have taken place even in the absence of the protected conduct.

At the time of the terminations Lewis and the Wheelers were working on Brookshire's crew on a portion of the job, referred to as Home Plate Plaza, which was drawing to a close. Thomas and another crew were building a wall on another portion of the job, referred to as Russell Street, which was completed in mid-September. A third portion, referred to as Picnic Grove, was supposed to begin soon. Brookshire's crew was to go to the Picnic Grove portion of the job when it started.

The crew at Home Plate Plaza was making forms for a wall and had finished the outside but not the inside. In addition to completing the wall, the job at Home Plate Plaza called for framing a circular staircase. On the day before Lewis and the Wheelers were terminated, they were told that there was no work for them that day, and there is no evidence to indicate a reason to believe otherwise. The testimony of Lewis and Jerry Wheeler establishes that on the last day they worked the materials they needed to finish the wall or start the staircase were not on the jobsite. Laboo testified that the plans for the wall were changed and that the wall on which the crew was working was taken out and changed. He also testified that underground utilities and a sprinkler system had to be installed before the staircase could be built. Laboo testified that Respondent was at a standstill on the jobsite; only Russell Street was going, and that was coming to an end.

Thomas also testified that work had slackened off at the time of the layoff and that work at Picnic Grove had not started

yet. When Lewis and the Wheelers were laid off, most of the others in Brookshire's group had already been laid off or had quit. Thomas testified that Respondent put in the staircase at Home Plate Plaza in late September or early October. A carpenter was moved from Russell Street to finish the work at Home Plate Plaza and then moved to Picnic Grove which started in late September or early October. Respondent next hired carpenters to work on the Camden Yard contract in October. One worked from October 18 to 29. A second and third worked from November 12 to December 20, and from November 13 to January 13, respectively.

I have discredited contradicted testimony of Thomas and Laboo, and there are inconsistencies between Thomas' and Laboo's testimony relating to whose employees completed the work on the staircase at Home Plate Plaza and the existence of carpentry work on another part of the job. However, there is no evidence to contradict their testimony that work had come to a standstill on the jobsite, except for completing the Russell Street wall. Their testimony with respect to the work on the jobsite is otherwise essentially consistent and to a limited extent supported by the testimony of Lewis and Wheeler as to the materials available and the hiatus of almost 6 weeks between the date of their termination and the next time Respondent hired a carpenter for the jobsite. There is no evidence of work at other locations for Respondent which might have been performed or of any practice relating to the recall of laid-off employees at Respondent's construction sites when work picked up. Although Lewis and the Wheelers undoubtedly had expectations that there was additional work for them based on what Brookshire had told them, the evidence fails to establish that Respondent had work they could have performed at any other location.

I find that the evidence supports the conclusion that the need for the services of Lewis and the Wheelers had come to a halt on September 8, that the need for additional carpenters did not resume until mid-October, and that Respondent has established that they would have been laid off for lack of work on September 8 without regard to their protected concerted activity. Accordingly, I shall recommend that the complaint be dismissed.

CONCLUSION OF LAW

The General Counsel has failed to prove that Respondent, DSI Enterprises, Inc., violated Section 8(a)(1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint dismissed.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.